APPENDIX A

(March 27, 2003)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-12907
Non-Argument Calendar

D.C. Docket No. 99-03319-CV-ODE-1

JOHN RICHARD FRAISER,

Petitioner-Appellant,

versus

GEORGE SMITH, Warden, W.S.P.,
ATTORNEY GENERAL, of the State of Georgia,

Respondents,

WALTER S. RAY, individually and as Chairman,
Georgia Board of Pardons and Paroles,
TONY HOWERTON, individually and as Warden,
Ware State Prison,

Respondents-Appellees.

Appeal from the United States District Court for the
Northern District of Georgia

Before TJOFLAT, BIRCH and CARNES,
Circuit Judges.
PER CURIAM:

John Richard Fraiser, a state prisoner, filed a habeas corpus petition under 28 U.S.C. § 2254, challenging the Georgia Parole Board's (GPB) revocation of his parole. The district court construed the habeas petition as properly filed under 28 U.S.C. § 2241. It then found that Fraiser failed to file the petition within one year after the GPB revoked his parole and, therefore, it was untimely based on the statute of limitations contained in 28 U.S.C. § 2244(d)(1). The district court dismissed the petition, and Fraiser timely appealed. We granted Fraiser a certificate of appealability on three issues: (1) whether a federal habeas petition challenging the revocation of parole should be construed as a 28 U.S.C. § 2241 petition; (2) whether the statute of limitations in 28 U.S.C. § 2244(d)(1) applies to federal habeas petitions brought pursuant to 28 U.S.C. § 2241; and (3) whether the district court erred in dismissing claims one through four of Fraiser's § 2241 petition as untimely.

We reviewed the district court's legal determinations de novo and its factual findings for clear error. Crawford v. Head, 311 F.3d 1288, 1295 (11th Cir. 2002). We first examine whether Fraiser's habeas petition should have been construed as a § 2241 petition. In Mason v. Askew, 484 F.2d 642 (5th Cir. 1973), the Court determined that the defendant's 42 U.S.C. § 1983 challenge to his parole revocation should be construed as a habeas petition under 28 U.S.C. § 2254. Id. at 643. The court reasoned: "Since appellant challenges not the conditions of his confinement, but the fact of imprisonment itself, the

court below correctly held that 42 U.S.C. § 1983 could not provide the requested remedy, and that appellant's federal relief would have to come in habeas corpus. The statute authorizing federal courts to issue writs of habeas corpus in behalf of state prisoner [is] 28 U.S.C. § 2254." Id. (internal citations omitted). We are bound by that decision. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc). Therefore, Fraiser's petition is properly cast as a § 2254 petition, and the district court erred in construing it as a § 2241 petition. That error does not require reversal, however, because we agree with the district court that Fraiser's claims are time barred.

Because Fraiser filed his petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-32, 110 Stat. 1214 (1996), its provisions govern this appeal. Under AEDPA, "[a] I-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1). That provision applies to § 2254 petitions. Smith v. Jones, 256 F.3d 1135, 1142-43 (11th Cir. 2001), cert. denied, 534 U.S. 1136, 122 S. Ct. 1081 (2002).

The GPB revoked Fraiser's parole on May 23, 1997. Pursuant to Georgia Code § 5-6-35(a) and (d), the time in which Fraiser could seek direct review of the parole revocation expired on June 22, 1997. Thus, the § 2241(d)(1) limitations period began to run on that date and expired one year later. Fraiser did not

file his state habeas corpus action until more than a year later, on July 1, 1998. Therefore, his petition was untimely.[1] Accordingly, we affirm the district court's judgment denying relief.

AFFIRMED.

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[1] Fraiser contends he did not learn of the factual predicate of his claims until February 11, 1998, when the GPB informed him that it would not consider him for parole until 2004, and therefore the statute of limitations did not begin to run until that date. He says he raised that argument in Ground Three of his habeas petition. Construing the petition liberally because Fraiser was pro se at the time, we nonetheless conclude that he did not raise that argument of his petition in Ground Three or in anything else he filed in the district court. Therefore, we do not consider it here. Depree v. Thomas, 946 F.2d 784, 793 (11th Cir. 1991).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN RICHARD FRAISER	:	
	:	
Petitioner,	:	
v.	:	CIVIL
	:	ACTION NO.
	:	1:99-CV-3319-0DE
GEORGE SMITH	:	
	:	
Respondent.	:	

ORDER

This pro se prisoner action brought pursuant to 28 U.S.C. § 2254 is currently before the court on Petitioner's December 23, 1999, motion for appointment of counsel and objections to the June 2, 2000, Report and Recommendation ("R&R") of United States Magistrate Judge E. Clayton Scofield III. Judge Scofield recommended dismissing Petitioner's habeas corpus petition as untimely pursuant to Section 101 of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), codified at 28 U.S.C.

§ 2244(d)(1). On June 14, 2000, Petitioner filed timely objections to the R&R.

John Fraiser ("Petitioner") is an inmate in the Ware State Prison in Waycross, Georgia. He was convicted on August 10, 1979, in the Superior Court of Gwinnett County for murder and armed robbery for which he received a life sentence. He was paroled on September 3, 1996. However, the State Board of Pardons and Paroles ("Parole Board") revoked Petitioner's parole status on May 23, 1997. Petitioner filed no appeal. Indeed, Georgia law provides no appeal beyond the Parole Board. On February 11, 1998, the Parole Board further notified Petitioner he would be denied parole consideration until 2004. On March 2, 1998, Petitioner appealed this determination, but the Parole Board denied this appeal on March 18, 1998.

Petitioner filed a state habeas corpus petition in the Ware County Superior Court on July 1, 1998. The state habeas court denied his petition on November 5, 1998.[1] The Georgia Supreme Court denied Petitioner's application for a certificate of probable cause to appeal the denial of habeas corpus relief on November 16, 1999.

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[1] Judge Scofield reported that on November 5, 1999, the state habeas corpus court denied relief. Petitioner submitted in his objection to the R&R that he was denied relief by the state habeas court on November 5, 1998. The court acknowledges Petitioner' s objection.

Petitioner filed the instant petition for federal habeas corpus relief on December 15, 1999. In Grounds One and Four, he contends that he was denied due process when he was not afforded a preliminary hearing prior to the revocation of his parole, and when the Parole Board allegedly relied on erroneous and false information in revoking his parole. Petitioner submits in Ground Two that he was unconstitutionally denied counsel during the process surrounding his parole revocation, especially in light of the fact that there was no preliminary hearing. In Ground Three, Petitioner asserts that his due process rights were violated when he was allegedly coerced into signing a waiver of his final parole revocation hearing. In Ground Five, Petitioner submits that the Parole Board violated the Ex Post Facto Clause by denying Petitioner parole consideration until March, 2004, asserting that at the time of his original sentence, Georgia law required annual parole consideration after the completion of the first seven years. Finally, Petitioner argues that the parole consideration set-off, requiring him to serve six additional years, is disproportionate to the misdemeanor traffic offenses for which his parole was revoked and thereby constitutes cruel and unusual punishment under the Eighth Amendment. He also asserts that the conditions of his confinement in the Georgia State Prison system constitute cruel and unusual punishment.

In the R&R, the Judge Scofield construed the petition as filed under 28 U.S.C. § 2254. Judge

Scofield recommended dismissal of the petition as untimely pursuant to 28 U.S.C. § 2244(d)(1), the AEDPA one-year statute of limitations. Judge Scofield also recommended that Petitioner's claims did not warrant equitable tolling of the statute of limitations.

When a party files timely objections to a Magistrate Judge's recommended disposition of a dispositive matter, a district court must make a de novo determination as to any portion of the disposition to which the party objects. See Fed.R.Civ.P. 72(b); 28 U.S.C. § 636(b)(1)(B). As Petitioner's motion for habeas corpus is dispositive, see 28 U.S.C. § 636(b)(1)(B), this court will review the objected-to portions of the R&R on a de novo basis.

Although the instant petition was filed pursuant to 28 U.S.C. § 2254 and analyzed by Judge Scofield as such, this court will construe the instant petition as one brought pursuant to 28 U.S.C. § 2241. Petitioner challenges aspects of his parole -- the execution of his sentence -- as opposed to challenging his conviction or original sentence. Neither the United States Supreme Court nor the United States Court of Appeals has directly ruled on the issue whether state prisoners challenging the execution of their sentence should proceed under § 2241, like federal prisoners, or whether § 2254 is the sole avenue for state prisoners to challenge any aspect of their

conviction and sentence. There is little unanimity among other courts.[2]

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[2] Some courts have held that 28 U.S.C. § 2254 is the only means by which state prisoners may bring a habeas corpus petition in federal court. See Story v. Collins, 920 F.2d 1247, 1250 (5th Cir. 1991) (holding that a state prisoner's claim regarding good conduct time is properly brought under § 2254, as that statute is the "sole remedy for a state prisoner seeking a speedier release from imprisonment. . ."); Bonilla v. Vaughn, 1998 WL 480833 at *5, (E.D. Pa. 1998)(holding that § 2254 "sets forth the proper procedure for any petition for writ of habeas corpus filed by a state prisoner contesting the duration of his imprisonment," making § 2254 applicable to parole denial and revocation issues); see also Joseph v. Parole Board of the State of Kentucky, 94 F.3d 644 (6th Cir. 1996) (unpublished disposition) (although not addressing the issue of which statute was the proper means to bring the challenge, the Court reviewed the § 2254 challenge to a parole revocation on the merits thus implying that it was correctly brought under § 2254); Morrison v. Johnson, 106 F.3d 127, 129 (5th Cir. 1997) (implying approval of a state prisoner's claim that he was "'in custody in violation of the Constitution or laws . . . of the United States' because the Board revoked his parole in an untimely manner" and invoking the jurisdiction of § 2254).

These cases rely on two Supreme Court decisions that imply that § 2254 is the only remedy for state prisoners. Morrisey v. Brewer, 408 U.S. 471 (1972), has been construed as implying the premise that § 2254 is the proper means of challenging parole revocations. See 16 Fed. Proc., L Ed. § 41:208. Morrisey sets out the minimal due process requirements for parole revocation proceedings. However, neither that opinion nor the appellate opinion below cites § 2254 by name or discusses the issue of which statute is the proper means to bring the habeas petition. The second decision is Preiser v. Rodriguez, 411 U.S. 475 (1973), which has been interpreted by some courts as holding that the sole remedy for state prisoners contesting the duration of imprisonment is a writ of habeas corpus pursuant to

28 U.S.C. § 2254. Yet the issue in Preiser involved whether state prisoners seeking restoration of their good time credits which would result in their release from prison was cognizable as a Civil Rights Claim or whether the sole remedy was through the federal habeas corpus statute with its accompanying exhaustion requirements. See id. at 476. Preiser did not address whether § 2254 or § 2241 governed habeas petitions challenging the execution of a sentence, specifically parole revocation.

In Van Zant v. Florida Parole Commission, 104 F.3d 325 (11th Cir. 1997), the Eleventh Circuit Court of Appeals reviewed the issue of the district court's subject matter jurisdiction under § 2241 as to a claim that the state prisoner's current sentence had been improperly and adversely impacted by proceedings in his previous criminal case. The Court found that the prisoner did not meet the "in custody" requirement of § 2241 as he was not "in custody" under the old sentence which had already expired when the § 2241 petition was filed; thus, the district court had no subject matter jurisdiction. The issue of whether § 2241 was the proper vehicle was not specifically discussed.

Other courts have held that state prisoners challenging the revocation of parole are challenging the execution of their sentence, which is governed by 28 U.S.C. § 2241, contrasting with 28 U.S.C. § 2254, which governs petitions involving challenges to the conviction or imposition of sentence. See Montez v. McKinna, 208 F.3d 862, 865 (10th Cir. 2000) (holding that a state prisoner may bring a habeas action under § 2241 or § 2254, dispelling the notion that an action by a state prisoner in custody pursuant to a state court judgment must be brought under § 2254 and stating that the distinguishing factors in determining which statute applies focus on whether the petitioner's claim attacks the execution of his sentence as it affects the duration of confinement in the place of execution, which "seems to fit better under the rubric of § 2241," or whether the claim attacks the continued validity of the sentence as originally imposed as a § 2254 petition would address); Cooper v. McKinna, 203 F.3d 834 (10th Cir. 2000) (unpublished disposition available at 2000 WL 123753) (holding that the

This court agrees with those federal courts that have interpreted language in § 2254 as expressly providing the writ of habeas corpus for state prisoners who are challenging their conviction or their sentence as originally imposed, reserving § 2241 for state prisoners who challenge the execution of their sentence. That distinction parallels the provisions for federal prisoners, as 28 U.S.C. § 2255 is reserved for challenges to the validity of a sentence or conviction and 28 U.S.C. § 2241 provides the means to bring challenges to the execution of the sentence. See Blau v. U.S., 566 F.2d 526 (5th Cir. 1978)[3]; U.S. v.

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district court incorrectly construed a petition by a state prisoner challenging his transfer to another prison as a § 2254 petition simply because the petitioner was in state custody, since the petition attacked the execution of a sentence, properly governed by § 2241); Avala v. Dept. of Corrections, 198 F.3d 257 (10th Cir. 1999) (unpublished disposition available at 1999 WL 1020847) (holding that the petition in question must be construed as a § 2254 petition because the petition addressed a term of parole set forth by the sentencing judge in his original sentence making the attack one on the validity of a conviction and sentence" in contrast to § 2241 proceedings that are used to attack the execution of a sentence); Batiste v. State of Louisiana Board of Pardon and Parole, 1999 WL 102027 (E.D. La. 1999) (holding that when a state prisoner challenges the decisions of a parole board and not the underlying conviction, that "the proper vehicle to review the decision of a parole authority is 28 U.S.C. § 2241"); King v. Lynaugh, 729 F.Supp. 57, 58 (W.D. Tex. 1990) (construing habeas petition challenging recission of "tentative parole" under § 2241 as it did not involve the constitutionality of either his conviction or sentence).

[3] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as precedent all decisions of

DiRusso, 535 F.2d 673 (1st Cir. 1976). While this distinction is widely accepted for federal prisoners, with respect to state prisoners, the law is not as precise.

This court holds that the proper avenue to challenge a parole revocation or other challenge to the execution of a sentence is under 28 U.S.C. § 2241. Therefore, as Petitioner challenges the revocation of his parole and denial of annual parole consideration, the instant petition will be interpreted under 28 U.S.C. § 2241.[4]

Consequently, this court must decide whether the one-year statute of limitations imposed by the AEDPA, applies to Petitioner's habeas claims as construed under § 2241. Again, neither the United States Supreme Court nor the United States Court of Appeals has directly addressed whether the AEDPA statute of limitations in 28 U.S.C. § 2244(d)(1) extends

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the former United States Court of Appeals for the Fifth Circuit rendered prior to October 1, 1981.

[4] This court does not lose jurisdiction over this case by construing the petition as being under § 2241. Section 2241(d), governing petitions when the prisoner is "under a judgment and sentence of a State court," provides that when that State has two or more Federal judicial districts, the habeas petition may be filed in the district within which the prisoner is in custody or in the district of the State court where the prisoner was convicted and sentenced. Petitioner was sentenced and his parole was revoked in Gwinnett County, which is within the Northern District of Georgia. Hence this Court retains jurisdiction under § 2241(d).

to petitions brought by state prisoners pursuant to § 2241.

On its face, § 2244(d)(1) does not expressly mention § 2241 or § 2254. It provides that "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1). This language defines the class of persons to whom the one-year limitations period applies and thus covers all state prisoners, whether proceeding under § 2241 or § 2254, as both groups are in custody pursuant to a judgment of a state court.

Petitioner argues that the subsections of § 2241(d)(1), in particular (d)(1)(A), which define when the period of limitations begins to run are inconsistent with the Magistrate Judge's determination. The statute provides:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
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> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Petitioner points out that in his case, there was no "judgment" as to the Parole Board's determination and no direct appeal beyond the full Board.[5]

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[5] Respondent admits that no direct review of a parole revocation would be authorized under state law. [Respondent's Answer p. 7]. Additionally, O.C.G.A. § 5-6-34, involving judgments and rulings that are directly appealable makes no mention of parole. While O.C.G.A. § 5-6-35 sets out the requirements for an application for appeal for probation revocation it is silent on parole revocation. See O.C.G.A. §§ 5-6-34 and 5-6-35 (1999). See also Antonopoulas v. State, 26 Ga. App. 787, 107 S.E. 359 (1921) (holding that "the order of the court revoking the probationer's parole is no such a final judgment as is subject to review. . . .").

Therefore, he argues that the language of (d)(1)(A) is inapposite to his case.

One could argue that the "direct review" referenced in (d)(1)(A) is represented by the appeal to the full Board and that the term "judgment" encompasses a nonreviewable order. However, assuming (d)(1)(A) does not apply, another subpart of (d)(1) - specifically (d)(1)(D) clearly does apply to Petitioner's claim that his parole was improperly revoked. Petitioner had full knowledge of the factual basis of his claim regarding his parole revocation on the date his parole was revoked and not appealed.

The limitations period began to run on May 23, 1997, the date of the parole revocation, and expired on May 23, 1998. Petitioner did not file his state habeas petition until July 1, 1998, after the expiration of the limitations period.

This ruling is consistent with other judicial rulings interpreting application of AEDPA to § 2241 in the context of issues of exhaustion and successive petitions. The United States Supreme Court has recognized that the AEDPA changed the standards governing the consideration of habeas petitions by federal courts with its imposition of new requirements for granting relief to state prisoners. See Felker v. Turpin, 518 U.S. 651, 660 (1996). In Felker, the Supreme Court recognized that its "authority to grant habeas relief to state prisoners [under § 2241] is limited by § 2254. . . ," in particular

by the new requirements imposed by the AEDPA.[6] Id. at 660. The Ninth Circuit Court of Appeals relied on Felker in extending the requirement of dismissal of successive petitions under the AEDPA, 28 U.S.C. § 2244(b)(2), to habeas petitions brought under § 2241. See Greenawalt v. Stewart, 105 F.3d 1287 (9th Cir. 1997). The Court interpreted Felker as follows: "The Supreme Court has instructed us that the authority of the federal courts to grant habeas relief to state prisoners under § 2241 is limited by 28 U.S.C. § 2254." See Greenawalt, 105 F.3d at 1287; accord Byrd v. Gillis, 1997 WL 698157 (E.D. Pa. 1997) (holding that a state prisoner's successive petition for a writ of habeas corpus pursuant to § 2241 must meet the requirements of the AEDPA, relying on Felker, even though the AEDPA does not expressly mention § 2241); Sinclair v. Jenkins, 1996 WL 511790 (D. Kan. 1996) (finding that "[a]lthough not expressly referenced in § 2244(a), the abuse of writ doctrine applies to § 2241 petitions as well."). Furthermore, in the context of habeas challenges by federal prisoners, the Eleventh Circuit has held that a federal prisoner may not use § 2241 to escape the successive petition limitations enacted by the AEDPA that restrict petitions brought under § 2255. See Wofford v. Scott, 177 F.3d 1236 (11th Cir. 1999); accord Roldan v. U.S., 96 F.3d 1013, 1014 (7th Cir. 1996).

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[6] However, Felker did not directly address § 2241 in the context of a state prisoner challenging the execution of his sentence but involved whether the AEDPA removed the Supreme Court's original jurisdiction to hear habeas petitions under § 2241.

The court further notes that this interpretation best incorporates the underlying purpose of the AEDPA amendments that serve to further notions of "comity and deference to state adjudicatory procedures" as well as Congressional intent of "curbing the abuse of the statutory writ of habeas corpus." See Montez, 208 F.3d at 869 (quoting H.R. Conf. Rep. No. 104-418, at 111 (1996)); see also accord Weekly v. Moore, 204 F.3d 1083, 1085 (11th Cir. 2000). Based on the foregoing analysis, the court adopts Judge Scofield's ultimate recommendation that Petitioner's claims regarding his parole revocation on May 23, 1997, Grounds One, Two, Three, and Four of the instant petition, should be dismissed as untimely under the AEDPA one-year statute of limitations.

However, Judge Scofield did not analyze Petitioner's claim with respect to the Parole Board's denial of annual parole consideration received by Petitioner on February 11, 1998. Petitioner appealed to the full Board but the Parole Board denied Petitioner's appeal on March 18, 1998. Subsequently, on July 11, 1998, Petitioner filed his state habeas action, which tolled the one-year statute of limitations. The state habeas court denied Petitioner relief on November 5, 1998. Petitioner filed his federal habeas corpus petition on December 15, 1999, following the Georgia Supreme Court's denial of Petitioner's application for a certificate of probable cause to appeal the denial of habeas corpus relief on November 16, 1999. Section 2244(d)(2) allows for the tolling of the statute of limitations during the time in

which state post conviction relief or collateral review is pending. The current record lacks the date on which Petitioner filed his application with the Georgia Supreme Court for a certificate of probable cause to appeal, which could impact whether Grounds Five and Six are timely under the one-year statute of limitations. Accordingly, the court remands this petition to the Magistrate Judge for a determination of whether Grounds Five and Six of the petition, challenging the denial of annual parole consideration, are timely under the tolling provisions of Section 2244(d)(2) and, if appropriate, for a report and recommendation on the merits of these claims.

Respondent requested additional time to submit an amended answer to address exhaustion specifically with respect to Petitioner's Ground Five claim regarding his ex post facto challenge to the parole consideration set off should the court find that his claim was timely. The court hereby grants this request.

The court now turns to Petitioner's remaining objection to the R&R. Judge Scofield recommended that Petitioner's claims did not provide sufficient grounds to justify equitable tolling. The Magistrate Judge cited Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998) for the proposition that "equitable tolling [was] not warranted where prisoner claimed he lacked access to federal statutes and case law and did not learn of AEDPA's time limitations until too late." [R&R at 3]. Petitioner's objection that reliance on

Miller is misplaced is without merit. As such, the court adopts Judge Scofield's recommendation that the statute of limitations does not warrant equitable tolling with respect to Petitioner's challenge to his parole revocation.

Judge Scofield did not address Petitioner's motion for appointment of counsel dated December 23, 1999. Petitioner requests appointment of counsel because he is not trained in the law, and he submits that he does not understand his rights under federal law and the procedures that he must follow. "[T]here is no automatic constitutional right to representation in a federal habeas corpus proceeding." Hooks v. Wainwright, 775 F.2d 1433, 1438 (11th Cir. 1985), cert. denied, 479 U.S. 913 (1986) (citing Pennsylvania v. Finley, 481 U.S. 551, 555 (1987)). In federal habeas proceedings, appointment of counsel prior to an evidentiary hearing is necessary only when due process or the "interests of justice" require it. See McBride v. Sharpe, 25 F.3d 962, 971 (11th Cir. 1994), cert. denied, 513 U.S. 990 (1994). No evidentiary hearing has been held with respect to Petitioner's federal habeas petition. Petitioner has not proffered evidence that either due process or the interests of justice command appointment of counsel. Further, Petitioner's briefs reflect an understanding of the law governing his case. See 18 U.S.C. § 3006A(a)(2)(B); McBride, 25 F.3d at 971. Thus Petitioner's motion for appointment of counsel is hereby denied.

Accordingly, Petitioner's motion for appointment of counsel [#3] is hereby DENIED. Magistrate Judge Scofield's R&R [#9] is hereby ADOPTED-IN-PART and REMANDED-IN-PART. Respondent's motion to dismiss the petition as time-barred [#7] is hereby GRANTED-IN-PART and DENIED-IN-PART. Respondents are DIRECTED to submit an amended answer within thirty days (30) of the date of entry of this order. Petitioner shall have thirty days (30) from the filing date of the amended answer to respond.

SO ORDERED, this day of September, 2001.

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

APPENDIX C

CHAPTER 153 – HABEAS CORPUS

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless–

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States, or

(3) he is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.
(June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 112, 63 Stat. 105, Sept. 19, 1966, Pub.L. 89-590, 80 Stat. 811.)

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§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in Section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under Section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under Section 2254 that was not presented in a prior application shall be dismissed unless –

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

3(A) Before a second successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive

application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the application shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to a judgment of a State Court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to feign an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the impediment to filing an application asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

(June 25, 1948, c. 646, 62 Stat. 965; Nov. 2, 1966, Pub.L.89-711, § 1, 80 Stat. 1104; Apr. 24, 1996, Pub.L. 104-132, Title I, §§ 101, 106, 110 Stat. 1217, 1220.)

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application of a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that-

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of,

clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that-

(A) the claim relies on-

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing

evidence that but for constitutional error, no reasonable fact-finder would have the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to

afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by Section 3006A of Title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in proceeding arising under Section 2254.

(June 25, 1948, c. 646, 62 Stat. 967; Nov. 2, 1966, Pub.L. 89-711, § 2, 80 Stat. 1105; Apr. 24, 1996, Pub.L. 104-132, Title I, § 104, 110 Stat. 1218.)

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a

prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation shall run from the latest of-

(1) the date on which the judgment of conviction becomes final.

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United sates is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in Section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by Section 3006A of Title 18.

A second or successive motion must be certified as provided in Section 2244 by a panel of the appropriate court of appeals to contain-

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

(June 25, 1948, c. 646 62 Stat. 967; May 24, 1949, c. 139, § 114, 63 Stat. 105; Apr. 24, 1996, Pub.L. 104-132, Title I, § 105, 110 Stat. 1220.)